No. 704.

Brief of Jones for Appellee

Office Supreme Court U. S.
FILED
APR 10 1899
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Clerk.

Filed April 10, 1899.

the Supreme Court of the United States,

October Term, 1898.

THE UNITED STATES,
Appellant,

AGAINST

E STEAMSHIP "OLINDE RODRIGUES," LA COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant-Appellee.

No. 704.
Prize.

Brief in Behalf of Claimant-Appellee.

EUSTIS, JONES & GOVIN,
Proctors for Claimant.

WARD K. JONES,
Of Counsel.

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against
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STATEMENT.

This is an appeal by the United States from an order of the District Court of the United States, for the District of South Carolina, discharging and directing the release of the French mail steamer *Olinde Rodrigues*, which had been captured by the U. S. Cruiser *New Orleans* off the port of San Juan, Porto Rico, on the 17th of July last, for an alleged attempt to force the alleged blockade of that port, claimed by the Government to be in effective existence at that time.

After the capture of the steamer, she was brought to Charleston, South Carolina, and a libel was thereafter filed by the United States in the District Court for that District praying that she might be condemned as lawful prize of war. Certain testi-

mony *in preparatorio*, under the standing interrogatories, was taken of *some* but not all of the witnesses on board the steamer, and upon that testimony a motion was made in behalf of the claimant for the discharge of the vessel. Pending the consideration of that motion the United States Attorney made an application to the Court for an order allowing further proof to be taken concerning the facts attending the capture, and a decision of the Court was thereafter rendered (see Opinion, p. 60 of Record) holding that no case had been made against the steamer, but that an order would be made on the Government's application for further proof. This order appears at page 105 of the Record and is to the effect that the captors have ninety days from the date thereof to supply further proof as to the entry of the *Olinde Rodrigues* into the Port of San Juan, Porto Rico, on July 4th, 1898, and as to the courses and movements of the said vessel on July 17th, 1898; and, furthermore, that the claimant should thereafter have such further time to offer testimony in reply as may seem proper to the Court.

After the close of the further proofs in behalf of the captors, the claimant moved for an order discharging the vessel upon two grounds:—First, because there was no proof in the cause showing that the alleged blockade of San Juan was of the close and effective character required by the law of nations, and the practice and declarations of the Government of the United States, to lawfully render and expose a neutral ship to condemnation for attempting to enter, or for entering, the said port; and secondly, because the proofs as they then stood, irrespective of any replying proofs on behalf of the claimant, were insufficient in law to warrant or justify a decree of condemnation; and the motion expressly reserved the right and privilege on the part of the claimant of adducing such further proof in its behalf as it might be advised, under the order of the Court already mentioned, in the event that

the motion should be denied. This motion appears at page 184 of the Record, folio 379.

The District Judge thereupon heard the said motion, and in deciding it (page 185 of Record) passed upon one question only, namely, the effectiveness of the blockade, and expressly declined to decide the other branch of the motion, namely, as to the sufficiency of the evidence to justify the conclusion that there was an attempt to enter the port (page 194 of Record, folio 399), stating that the case, in the event of his decision upon that branch of the motion not being sustained, would require a re-examination, and, as additional testimony might perhaps be offered, it was not considered either proper or necessary to express any opinion upon that point.

The case comes before this Court, therefore, upon the single question as to the effectiveness of the blockade of San Juan at the time of the capture, and although it is observed that the brief, and perhaps the oral argument of counsel for the United States, is principally devoted to the *ex parte* and incomplete evidence as to the fact of attempted entry, this brief and the presentation of the case of the claimant in this Court at this stage of the cause will be limited (aside from a few general observations), to a discussion of the only point decided by the District Judge, which, if overruled by this Court, will either necessitate a recommitment of the case to the District Court for additional testimony on the part of the claimant, or an order for further proof in this Court, and then a consideration of the case as a whole, in respect to the charge of attempting to enter the port.

After the argument of the motion to discharge the vessel upon the grounds above stated, and pending its consideration by the District Court, an application was made by counsel for the claimant to the judge, upon notice to the District Attorney, for a requisition upon the Navy Department for all des-

patches and correspondence between the commanders of vessels successively claiming to blockade the port of San Juan and the Navy Department with respect to the effectiveness of the same. This request was made because the Navy Department refuses to give information concerning its records for use in suits before the courts, except upon the call of the Court.

The District Judge made this call, and yet, in response to it, as the claimant is now advised, but one telegram, namely one from Captain Sigsbee of the *St. Paul*, which had been on the blockading station, was furnished. In the appendix to the report of the chief of the Bureau of Navigation of the Navy Department, however, there appear two other despatches, one from Captain Sigsbee and the other from Commander Davis of the *Dixie*, the latter representing the views of Captain Folger of the *New Orleans*, which captured the *Olinde Rodrigues*, both of which materially bear upon the question of the sufficiency of the blockade. These despatches appear respectively on pages 224 and 225 and 642 and 648 of the above-mentioned "Appendix to the Report of the Chief of the Bureau of Navigation" of the Navy Department, and are made the subject of a motion that the same be inserted into the Record in this case; and assuming that this application will be granted, those despatches will be considered in the discussion of the case on the part of the claimant.

POINTS ON BEHALF OF CLAIMANT-APPELLEE.

First.

There was gross irregularity in the taking of the depositions in this case materially affecting the weight to be accorded to the Government's side of it.

It may be stated at the outset that, according to the view of the claimant, a gross irregularity was committed by the Government in the examination of witnesses *in preparatorio*. Section 4615 of the Revised Statutes provides, among other things, that "the commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log-book, with all other documents, letters and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting the title, national character, or destination of the prize."

By Section 4618 of the Revised Statutes it is made the duty of the District Attorney, among other things, to see "that the proper preparatory evidence is taken by the Prize Commissioners, and that the Prize Commissioners also take the depositions *de bene esse* of the prize crew, and of other

transient persons cognizant of any facts bearing on condemnation or distribution."

Section 4622 of the Revised Statutes, furthermore, provides, among other things, that "the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority from the court; and witnesses who have the rights of neutrals shall be discharged as soon as practicable."

A large number of passengers, as well as the officers of the *Olinde Rodrigues*, were sent to Charleston on the ship, and those passengers should have been examined by the District Attorney and their depositions taken *in preparatorio*. It is apparent, however, that this was not done, inasmuch as there appears on page eight of the Addition to the Record, filed April 1st, 1899, that many of the passengers had knowledge of the destination of the ship and the circumstances attending her capture, because of their statements in respect thereof there set forth at length. These passengers include Mr. Firmin, a lawyer by profession, formerly Minister of Foreign Affairs to Haiti; Mr. Monerat, representative of commerce; Mr. Andreoh, merchant, Port-au-Prince; Mr. Altieri, merchant, Cape Haitien; Mr. de Lara, merchant, Donudurean; Father Picarda, prefect at the Seminary of Port-au-Prince; Abbé Plessis, missionary curate and Mr. Faure, representative of the House of Anglade of Bordeaux, all respectable and intelligent men; and it is apparent, from an examination of the case, that only one of these passengers was examined by the District Attorney, namely, Julien, a novitiate preparing for the priesthood, whose testimony the District Judge, in his first decision, expressly declared to be without any credit whatever. (See fol. 152 of Record).

Had the District Attorney performed his duty of taking the depositions of all the witnesses who thus appear to have had knowledge concerning the facts attending the capture, the probability is that there

would have been no order for further proof, and that this vessel would have been discharged within a few days after her capture. This irregularity has put the claimant in the position of being obliged on its part to take the testimony of these witnesses, and in the orderly course of procedure, this could only be done after the Government had exhausted its case.

Second.

This case is emphatically sui generis, and the capture in question was made under circumstances having no precedent in the reported cases.

Although the only question before this Court in the present appeal is the question as to the effectiveness of the blockade of San Juan, there are certain striking aspects of the case so different from those of any in the history of the law of blockade as to deserve preliminary notice, and these features seem to us to present certain considerations, which, in our judgment, should have great weight in aiding the Court to form a correct view of the situation.

These considerations are as follows:

A. There is no precedent of a vessel captured for violating blockade without the complicity of the owner.

In all the cases which have come under our observation—and it must necessarily be so—an attempted breach of blockade must be intended by the *owner or charterer of the vessel.* He directs and instructs the commander of his vessel to undertake this perilous enterprise. He knows what will be the consequences of failure or success. It is his

property that he is willing to expose to capture and confiscation in order to secure large profits if his venture should prove successful. It is impossible to conceive a case where the directing authority of the principal so absolutely and completely controls the acts of his agent. The preparations for an attempted breach of blockade, the purposes of such an attempt, are matters for his decision, and it is for this reason that the most trustworthy incriminating evidence of the attempted offence is invariably furnished by the offending vessel, such as her papers, her cargo, instructions to the commanding officer, etc., and that the search *aliunde* for evidence of the vessel's guilty intention rarely becomes necessary, because it would be misleading.

The motive and purpose of the owner of a vessel intending to run the blockade are thus clearly ascertained. It is like finding stolen property in the possession of an accused thief, and evidences of a guilty intention are concomitant with the preparation necessary for such a perilous enteprise.

The total absence in this case of a scintilla of evidence which is invariably furnished by the vessel in cases of condemnation for an attempted breach of blockade certainly constitutes the basis for a conclusive presumption of the innocence of the owner, and established the fact that he did not contemplate or intend that his vessel should be used for the purpose of running a blockade.

There is not a single fact, circumstance or incident that would justify the slightest suspicion that in this case the owner connived at, consented to or approved any attempted breach of blockade by this vessel.

We do not maintain that this pregnant and overwhelming fact of the innocence of the owner of the vessel absolutely controls the decision of the case, but we do maintain that it forces the Government to rest its claim for condemnation upon some very novel theory which is not in accord with the usual facts in such cases, and which can only be founded

upon a suspicion or conjecture; that is, that the master of the vessel, of his own volition, decided on his own responsibility to attempt to run the blockade at San Juan.

Upon the theory thus presented this case is *sui generis*. It has no analogy to any other case, and it has no parallel in the history of prize cases.

To reach the conclusion that the master of a vessel could assume the responsibility of thus sacrificing the valuable property entrusted to his care and guardianship by his principal, the owner, the Court must convict the captain of an act of criminal folly, of the wanton betrayal of an important trust, of an almost wilful sacrifice of the property of his principal, and of exposing him to heavy damage suits by the owners of the cargo, which it would be impossible to reconcile with the faithful service that the owner has a right to expect from the master of his vessel, by reason of his responsible and confidential employment.

The owner of the vessel being innocent, it is not unreasonable that the Court should require the Government to establish, by clear and convincing proof, that the captain of this vessel had a motive and purpose in attempting to run the blockade. The confiscation of a neutral's vessel is the severest penalty known to international law. While it is a right accorded to the belligerent, it is the exercise of an exceptional jurisdiction widely differing from the right to capture the enemy's property. In both cases the capture and condemnation result from the acts of legitimate warfare. In the case of capture and condemnation for an attempted breach of blockade Judge Betts, in the case of *Hallie Jackson*, clearly states the reason upon which this rule of international law is based. He says: "The neutral merchant becomes a participator with the enemy in any undertaking or device to violate a blockade, and his property is thereby made to share a common fate with the enemy's itself." The *Hallie Jackson*, Blatch. Pr. Cas., 41; 11 Fed. Cas., 291.

In this case the Government has presented no proof whatever that this captain had any motive or interest in attempting a breach of blockade. Some inducement ought to be clearly established. He had everything to lose and nothing to gain personally. The theory that at the suggestion of somebody he could increase his number of passengers by stopping at San Juan is refuted by the cable sent by the captain from Cape Haytien to the effect that, having been notified of the blockade, he would not stop at San Juan. What guaranty could he have given that, even if he went into San Juan, he could bring out those passengers? It would also require a great deal of courage for people to take passage on a steamer liable to be captured. This theory is based upon a palpable improbability and does not deserve the serious attention of the Court, for the almost certain large loss by capture does not correspond with the possible small profit.

If any ship owner were asked if such a case were possible he would answer that no captain would dare assume the responsibility of committing such a foolhardy, madly rash and indefensible act.

B. It is in no sense a necessary reflection upon officers of the Navy for the courts to declare particular captures illegal.

Another preliminary observation deserves attention. Naval officers cannot and do not claim to be infallible. In their trying positions cases of excess of zeal not infrequently occur. Captors are required to bring the case of the captured vessel before a Prize Court in order to determine the question whether strong suspicion, which will excuse a capture in the case of an attempted blockade, was well founded and is justified by the facts and evidence, or whether the naval officers committed an error of judgment. The very object of bringing in a ship for judicial enquiry is to ascertain the facts which at the time of capture may be obscure or doubtful.

During our Civil War the *Trent* affair is a notable case. Captain Wilkes received the thanks of his Government for boarding the *Trent*, yet his Government had to disavow his act as illegal.

In the recent war with Spain a Federal Judge (Southern District of Florida) decided that the capture of the *Catalina* and the *Miguel Jover was* illegal, and the Attorney General withdrew the appeal of the Government in both cases, being satisfied that the naval officers were not justified in making these captures. The United States Government is called upon to pay nearly half a million of dollars for captures on the high seas of Canadian sealing vessels, adjudged by a competent tribunal to have been illegal and unjustifiable. The law imposes upon the Court the responsible duty of revising and approving or disapproving of the acts committed by naval officers. The capture may be excusable on the part of the naval officers, although illegal, but the Court cannot justify its judgment of confiscation of an innocent neutral's property, except upon clear and conclusive proof presented by the Government in such cases.

C. The decisions of our Courts respecting captures during our Civil War should be viewed with regard to the special condition of things then existing, and not be applied fully to cases arising out of our recent war with Spain.

Another consideration which, it is thought, the Court should bear in mind in deciding this case is the inapplicability of the decisions of our American Courts with respect to captures made in our late Civil War.

This is especially true with regard to the law of blockade, for, as observed by Mr. Hall, a writer of the highest authority, (Hall Int. Law, 4th Edn., p. 735), "During the American Civil War the courts of the United States *strained and denaturalized the principles of English blockade law to cover*

doctrines of unfortunate violence." This had its cause, doubtless, in the fact that our Civil War was really for the preservation of the national existence, and from necessity the law of blockade was stretched to its utmost tension in spite of the protests of various neutral European nations.

At an early stage of that contest Congress passed an act authorizing the President of the United States to absolutely close all the ports of the insurrectionary States, and thus practically laid an embargo upon the entire neutral commerce of the world with those ports. (See Act July 13, 1861, Ch. 3, Sec. 4. 12 Stats. at L., 256). And although the diplomatic correspondence of our Government shows that this extreme measure would not be put into operation except under the pressure of great necessity, and that, therefore, we would keep in constant view the rule respecting blockades laid down by the Treaty of Paris, yet the policy of the executive branch of the Government, and the decisions of the judiciary in upholding it, seems to us to be in entire harmony with the spirit of the legislation just referred to. Upon this point we quote the remarks of Mr. Seward to Mr. Adams, our Minister to Great Britain, under date of July 21st, 1861:

> "Nothing has occurred to change this condition of affairs, (*i. e.*, the good understanding between the two governments), unless it be the attitude which Lord John Russell has indicated for the British Government in regard to an apprehended closing of the insurrectionary ports and the passage of the law of Congress which authorizes that measure in the discretion of the President.
>
> It is my purpose not to anticipate or even indicate the decision which will be made, but simply to suggest to you what you may properly and advantageously say while the subject is under consideration.

First.—You will, of course, prevent misconception of the measure by stating that the law only authorizes the President to close the ports in his discretion, accordingly as he shall regard exigencies now existing or here, after to arise.

Secondly.- The passage of the law, taken in connection with the attendant circumstances does not necessarily indicate a legislative conviction that the ports ought to be closed, but only shows the purpose of Congress that the closing of the ports, if it is now or shall become necessary, shall not fail for want of power explicitly conferred by law. When, on the 13th of April last, disloyal citizens defiantly inaugurated an armed insurrection by the bombardment of Fort Sumter, the President's constitutional obligation to suppress the insurrection became imperative.

But the case was new, and had not been adequately provided for by express law. The President called military and naval forces into activity, instituted a blockade, and incurred great expense, for all which no direct legal provisions existed. He convened Congress at the earliest possible day to confirm these measures if they should see fit.

Congress, when it came together, confronted these facts. It has employed itself less in directing how and in what way the Union shall be maintained than in confirming what the President had already done, and in putting into his hands more ample means and greater power than he has exercised or asked.

The law in question was passed in this generous and patriotic spirit. Whether it shall be put into execution to-day or to-morrow, or at what time, will depend on the

condition of things at home and abroad, and a careful weighing of the advantages of so stringent a measure against those which are derived from the existing blockade."

See Wharton's Digest Int. Law, Vol. III, pp. 358-359.

In the late war with Spain our government rested under no such stress of necessity as that which existed during our Civil War; and it is, therefore, respectfully submitted that the policy of our government and the decisions of our courts in the cases growing out of the Civil War have little, if any, application to cases of blockade now arising, as they must be considered as having been rendered in circumstances altogether exceptional.

Third.

In order to justify the capture of a neutral vessel upon the charge of attempting to violate a blockade it is necessary for the captors to prove, as part of their case and as the foundation of the right to capture, all the facts necessary to render the captured vessel liable to forfeiture, and the prerequisite and fundamental fact must be proof of the effectiveness of the blockade.

In the case of the *Betsy*, 1 Rob., 93, Sir William Scott held that "to constitute a violation of blockade *three things must be proved*: 1st, the existence of an *actual blockade;* 2d, the knowledge of the

party supposed to have offended; and 3d, some act of violation either by going in or coming out with a cargo laden after the commencement of blockade."

In commenting upon this decision of Sir William Scott, Mr. Owen, in his work on "Declaration of War" (London, 1889, p. 106), says: "The learned Judge rightly placed first the *proof of the existence of the actual blockade*; for a shipmaster can scarcely be charged with violating a blockade of the existence of which there is *no proof*."

This rule, as far as we have extended our examination of the cases and authorities, is not only absolutely uncontroverted, but seems to be universally accepted.

The Government, in the presentation of this case, failed to introduce a syllable of evidence to show either that there was a blockade of San Juan, in fact, or that it was effectively maintained. It seems to have been thought that the President's proclamation declaring a blockade was sufficient; but this is a mistake. The mere proclamation of the President declaring a blockade does not satisfy the rule that there must be proof of its existence and effectiveness. This is clearly established.

In "Manning's Law of Nations" (London, 1875, p. 403) it is said:

> "The rule is explicit that the actual *existence* of blockade is necessary to involve the penalties of breach of blockade. A declaration of blockade, *unaccompanied by the fact of blockade*, does not establish a blockade. It was so determined by our Lords of Appeal in the war with Napoleon I. Admiral Jervis declared the West India Islands in a state of blockade, 'but the Lords held, that as *the fact did not support the declaration*, a blockade could not be deemed legally to exist.'"

We are aware that in the case of the *Circassian* (2 Wall, 155) the distinction between simple blockades (*i. e.*, blockades by a naval commander without governmental notification) and public blockades (*i. e.*, by proclamation and notification by the government seeking to establish it) was pointed out, and that the Court remarked that, "in a case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance, in order to protect themselves from the penalties of attempted violation;" but, as the case of the *Circassian* must be read with reference to the facts before the Court, this remark of the Chief Justice has no application to this case, because the question in the case of the *Circassian* was whether or not a blockade, which was duly proved to exist so far as the naval forces necessary to maintain it were concerned, was in fact *raised or discontinued* by the capture of *New Orleans*, and the burden of proof, the Court held, rested on the claimants.

We are also aware of a remark of Judge Betts in the case of the *Hallie Jackson* (Blatch Pr. Cas., 41; 11 Fed. Cas., 290), "that there was in fact an effective blockade at the port on the arrival of the brig is demonstrated by her arrest there." But this was a case of a vessel captured as *enemy's property*, and the question of blockade was only subsidiary. Moreover, the point does not appear to have been argued, nor does it figure at all as the *ratio decidendi* of the case, and the remark of the Judge, therefore, is nothing more than one of those observations indulged in in a running discussion of the case, and should be regarded as a mere *obiter dictum*—an *obiter dictum*, too, in direct conflict with authorities in which the question has been considered as a controverted or litigated point.

Fourth.

Not only has the Government failed to prove the effective character of the blockade in question, but the facts show the reverse.

The proofs on the part of the Government show that there was but one warship (the *New Orleans*) stationed at San Juan; that the range of her heaviest guns, at their greatest elevation, was six miles; that he was attempting to blockade a port with a wide roadstead or entrance to its harbor, and compelled, by reason of the land fortifications, to be stationed at a distance of ten or twelve miles at sea in the face of three miles of shore batteries mounted with heavy guns, besides the inner fortifications of the port; and the despatches of Captain Sigsbee and Commander Davis (which will be noticed further on) also show that several Spanish war vessels were in the harbor threatening attack.

We contend that the presence of one war vessel is insufficient, under the law of nations, to constitute a blockade of such a port as San Juan, fortified and defended as the proofs show.

How many vessels may be necessary depends upon circumstances always to be proved by the government attempting to justify the capture.

In order to be effectual, a blockade, according to Sir William Scott, must be maintained "by stationing *a number of ships* and forming, as it were, *an arch of circumvallation* round the mouth of the prohibited port. Then, *if the arch fails in any one part*, the blockade fails altogether."

The *Arthur*, 1 Dodson, 425.
The *Stert*, 4 Rob., 65.

In the case of the *Arthur* (*supra*) it was distinctly held that a blockade was *not effectual* when it was attempted to be maintained by *a single ship.*

It is true in the principal case (*i. e.*, the proceedings for condemnation) the vessel captured was condemned; but the point now referred to was either not raised, or, if raised, the condemnation was based upon a supposed measure of retaliation. The point contended for now was clearly established, *i. e.*, that there must be a sufficient number of ships to form an "arch of circumvallation," and that one vessel cannot form that arch.

So firmly established is this rule as to the effectiveness of a blockade to bind a neutral vessel, that it has been even held that if several ports are included in a declaration of blockade, when only one of such ports is in fact blockaded, *the whole declaration is nullified*, and a neutral cannot be condemned for an attempt to break the blockade of that port which is really invested.

> See Douglas Owen on "Declaration of War," (London, 1889), 107, citing the *Henrik & Maria*, 1 Rob., 146; *The Mercurius, Ib.*, 83; *The Betsy, Ib.*, 93.

Mr. Hall, in his work on "International Law," (4th Edition, London, 1895), at page 719, says:

> "It is agreed that for a maritime blockade to be duly set up and maintained—
>
> 1. The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have in some way been brought to the knowledge of the neutrals affected.
>
> 2. It must have been initiated under sufficient authority.
>
> 3. It must be maintained by a *sufficient* and *properly disposed force*."

The counsel for the captors in the presentation of his argument at the oral discussion of this case in the District Court, sought by a forced reading of Mr. Hall's work, to lead the Court to suppose that

the above stated rules were those of the continental nations only, and that they were at variance with the English and American rule. We observe, too, that the same contention is made in this Court. But a reference to Mr. Hall's treatise (p. 728) shows that the difference between the English and American and the Continental rules is only (so far as the present question is concerned) as to the *disposition* of the blockading squadron and *not* as to its effectiveness.

He says:

> "The opinions held by the majority of modern continental writers as to the conditions under which a blockade is efficiently maintained, differ in several important respects from the principles which guide the practice of England and the United States. They may, perhaps, be summarised as follows: The immediate entrance to a port must be guarded by *stationary* vessels in such number as either to render entrance impossible, or at least to expose any ships running in *to a cross-fire from the guns of two of them.* Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel in attempting to enter. As, for three-quarters of a century, by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labour under the disadvantage of being inconsistent with the most authoritative usage upon the subject. They are also much more rigid than the principles embodied in the Declaration of Paris, and accepted by the great majority of civilized nations. It is hardly necessary, therefore, to inquire upon what ground they are stated to represent existing law. The signatary powers of the Declaration of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that 'blockades

in order to be binding must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.'" (Hall's Int. Law, 4th Edition, pp. 728, 729 and 730).

And in the notes on pages 728, 729 and 730 of the same work the following summary of the law of European countries appears:

"The opinions of the various writers are essentially identical, but differ from one another on some points. Heffter (Sec. 155) requires that vessels shall be 'stationnes en permanence et en assez grand nombre pour empecher toute espece de communication avec la place ou le port investi'; but he does not hold that temporary absence entails cessation of the blockade. Ortolan (ii, 328) thinks that blockade of a harbour is not effective unless 'toutes les passes ou avenues qui y conduisent sont tellement gardees par des forces navales permanentes, que tout batiment qui chercherait a s'y introduire ne puisse le faire sans être aperçu et sans en être détourne;' and considers (344) that if weather has caused the temporary absence of the blockading squadron, although the blockade is not raised, it is open to a vessel to attempt to enter, and if taken, to allege ignorance of the fact of blockade. Calvo (Sec. 2567) declares that the belligerent must have a sufficient force, so disposed as to become 'le maitre de la mer territoriale qu'il occupe, et à pouvoir en interdire l'accès à tout navire étranger;' apparently he requires that the ships shall be anchored. Hautefeuille (Tit. IX, Chap. ii, Sect. i, Par. 1) says that 'le blocus n'existe qu'autant que le belligérant qui attaque un port place devant ce port un nombre de batiments de guerre suffisant pour en commander

les abords par leur artillerie;' and holds (Sect. 111, Par. 2) that interruption from any cause terminates the blockade. To Gessner (179) 'la définition de la première neutralité parait exemplaire;' a blockaded port is therefore one where there is, 'par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.' He exhausts the language of invective in assailing the existing doctrine and policy of England, and is fully satisfied with the American practice during the Civil War. It is not for me to attempt his extrication from the complicated inconsistencies in which he has thus involved himself. Pistoye and Duverdy (i, 365) confine themselves to cautious and accurate language. 'Il faut,' they say, 'que la place soit investie par des forces suffisantes pour en rendre l'entrée périlleuse aux navires qui voudraient s'y introduire.'

The proposed Règlement des Prises Maritimes, adopted by the Institut de Droit International, provides that a blockade is to be considered effective, 'lorsqu'il existe un danger imminent pour l'entrée ou la sortie du port bloqué, à cause d'un nombre suffisant de navires de guerre stationnés ou ne s'écartant que momentanément de leur station.' It adds that 'si les navires bloquants s'éloignent de leur station pour un motif autre que le mauvais temps constaté le blocus est considéré comme leve.' Ann. de l'Institut, 1883, p. 218. The effect of the suggested rules would approach very nearly to the English practice."

(Note 1, pp. 728–9.)

"A few treaties contain stipulations in agreement with the views of the foreign writers whom I have quoted. I am not

aware that any blockade has ever been conducted under their provisions. In 1742 France and Denmark agreed that a blockaded port should be closed by two vessels at least, or by a battery of guns on land, and the same stipulation was made between Denmark and Genoa in 1789. The treaty between Holland and the Two Sicilies in 1753 prescribes that at least six ships of war shall be ranged at a distance slightly greater than gun-shot from the entrance, or else that the blockade may be maintained by shore batteries and other works. The First Armed Neutrality, in 1780, laid down that blockade must be effected with vessels stationary and sufficiently near to produce evident danger in entering. The Second Armed Neutrality put forward the same doctrine; but Russia, in her treaty with England in 1801, consented to substitute the words, 'arrêtés ou suffisamment proches,' for 'arretes et suffisamment proches,' and the only treaty since concluded in which stringent stipulations are made is that between Denmark and Prussia in 1818, by which it was required that two vessels should be stationed before every blockaded port. Hautefeuille, Tit. IX, Chap. 11, Sect. i, § 1; Gessner, 159; De Martens, Rec. VII, 263."

(Note 1, pp. 729-30.)

"With reference to the meaning of the Declaration of Paris, Lord Russell, in 1863, wrote as follows: 'The Declaration of Paris was in truth directed against what were once termed "paper blockades"—that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. . . . The interpretation, therefore, placed by Her

> Majesty's Government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two goverments some years before the present war, with a view to the accession of the United States to that Declaration.' Lord Russell to Mr. Mason, Feb. 10, 1863; ap. Bernard, 293."
>
> (Note 1, p. 730.)

For a further review of the authorities upon this point the Court is referred to

Risley's "Law of War," (London, 1897), p. 242.

Walker's Manual of Public International Law, (London, 1895), p. 212.

Manning's Law of Nations, (London, 1875), p. 402.

Walker's Science of International Law, (London, 1893), p. 516.

Wheaton's International Law, (3 English Edition, London, 1889), p. 672.

Fifth.

But whatever may be the law as laid down by the reported decisions and the authoritative text writers the fact that there was no effective blockade in this case is conclusively disposed of by the despatches of Captain Sigsbee, and also the despatch of Commander Davis, which have been laid before the Court, the later representing the views of Captain Folger of the *New Orleans*, the ship that made the capture.

In the presence of the despatches that have been presented to the Court from the "Appendix to the Report of the Chief of the Bureau of Navigation of the Navy Department," it seems to us that the question of the effectiveness of the blockade is absolutely foreclosed against the Government, and it appears to us almost idle to discuss the question. The despatches are explicit to the effect that in the opinion of two successive commanders of vessels attempting to blockade San Juan, including the commander of the vessel which captured the *Olinde Rodrigues*, that *the blockade was not effective*. These despatches are as follows:

Captain Sigsbee:

> "I venture to suggest that *in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port*, enough to detach some occasionally to cruise about the Island."

> "*U. S. S. St. Paul*,
>
> MOLE ST. NICHOLAS, Haiti, June 27, 1898.
>
> SIR:
>
> Instead of leaving the blockade of San Juan to-night to proceed direct to New York

for coal, in conformity with your order to me to proceed when necessity arose, I decided yesterday to come here instead, in order to recommend to you promptly an increase of the blockading force off San Juan, where the *Yosemite* now remains alone, and where the *St. Paul* was alone before the *Yosemite* arrived. Had I remained off San Juan until tonight my coal would not have brought me here and permitted me to go to New York also; I therefore decided to sacrifice one day, in order that my recommendation to you should not be delayed for a number of days, as would have been the case had I proceeded direct to New York.

It was immediately demonstrated to the *St. Paul* on her arrival off San Juan that she would not be permitted to approach the batteries undisturbed. In fact, Spanish war vessels endeavored to entice her under the batteries, which, as you know, are very heavy.

I beg to respectfully suggest that the difficulties of blockading the single port of San Juan are greater than those to be met in blockading Havana, where there are no Spanish war vessels and no torpedo-boat destroyers, and where ports are blockaded both to the eastward and westward, thus giving flank support. Vessels intending to run the blockade of San Juan can, owing to the short length of Porto Rico east and west, make telegraphic communications with San Juan for advice with reference to the disposition of the blockading force, and this they can do within a few hours of their expected arrival at that port. This can be done by visiting the east and west anchorages of the Island or St. Thomas. San Juan being well to the windward in the trade region, and having no land influences to windward of it, the seas off that port are

naturally continuously rough day and night, making boarding both prolonged and difficult, especially for auxiliary crews. *When a single vessel constitutes the blockading force she will oftentimes be compelled to make the visit close in to the port, where she will be uncommonly exposed to attack during the visit.*

I was the more impelled to leave San Juan a day in advance of my original intention by my belief, based on reports from the harbor of San Juan, that the torpedo-boat *Terror* could not, within the single day devoted to my visit here, repair the damage done to her by the *St. Paul*, in regard to which I refer you to another letter of this date. It is advisable to constantly keep the *Terror* in mind as a possible active force; but leaving her out of consideration, the services to be performed by the *Yosemite*, of blockading a well-fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken. It was still more difficult for the *St. Paul* when she was alone on the blockade. The *St. Paul's* speed was reduced, by an accident to her starboard engine, within two knots of the maximum speed of the *Yosemite*. That made but little difference, except in chasing, for the reason that she also had to maintain the blockade as against any force of the enemy.

"I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some occasionally to cruise about the Island. West of San Juan the coast, although bold, has outlying dangers, *making it easy at present*

for blockade runners having local pilots to work in close to the port under the land during the night.

Very respectfully,

C. D. SIGSBEE,
Captain, U. S. N., Commanding.

The Secretary of the Navy."

"U. S. S. DIXIE,
Off Porto Rico, July 26, 1898.

Sir:

I have the honor to report that in obedience to your order of the 24th instant, I stood into San Juan, Porto Rico, and found only the *New Orleans*, Captain Folger, blockading off that port.

Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night.

There are in San Juan, Porto Rico, the *Terror*, torpedo gunboat; the *Isabella II*, cruiser; a torpedo-boat and a gunboat; there is also a German steamer, which is only waiting an opportunity to slip out.

The *New Orleans* is the only ship I have sighted on the coast of Porto Rico. Captain Folger had no knowledge of the whereabouts of the *Prairie* or *Montgomery*.

Captain Folger directed me to report that one ship was inadequate for the blockade of San Juan, and there should be more than two ships off that port to establish an effectual blockade.

The *New Orleans* could not approach within less than six miles of the entrance of San

Juan without drawing the fire of the batteries, mounting 8-inch guns well served. It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be re-enforced there with the least possible delay.

On the morning of the 25th, in the execution of your orders, I went to San Juan to collect any force that might be there, but found no United States ships there. I took as a prize the French steamer, *Manoubia*, of Marseilles, from Martinique, bound for Sagua la Grande, Cuba. I have made her the subject of a separate letter to the Commander-in-Chief, which I herewith enclose.

I am, sir, your obedient servant,

C. H. DAVIS,
Commander, Commanding.

Capt. F. J. HIGGINSON, U. S. N.,
Commanding U. S. S. Massachusetts, Senior Officer Present."

Sixth.

The force of Captain Sigsbee's despatches, and the opinion of Captain Folger that the blockade was not effective are not overcome by the explanation attempted by the Government.

The Government, however, seeks to make a distinction between a commercial blockade and a military blockade, as if the military operations of defending the place besieged were to be left out of

consideration in determining the effectiveness of a blockade; and counsel have presented an affidavit of Captain Folger to the effect that when he alluded to the ineffectiveness of the blockade he referred only to the danger of attack, &c., and an affidavit of Captain Davis is also offered to support this statement.

Although invidious personal criticism is always disagreeable, and the necessity for it often to be deprecated, we cannot refrain from observing that these statements of Captain Folger and of Captain Davis have all the qualities of an afterthought. They are, to say the least, in singular contrast with the clear and emphatic opinion of Captain Sigsbee who expressly refers to the inadequacy of *one vessel to intercept the ingress and egress of blockade runners;* and he also refers to a German steamer inside the port of San Juan ready to slip out when occasion might present itself. The egress of the latter vessel from the port might, obviously, take place under the convoy of the Spanish naval vessels, or at some time when an opportunity presented itself to pass out without such convoy. Captain Sigsbee, as we say above, speaks of the inadequacy of one vessel to blockade the port, not only as to the entry and exit of commercial vessels, but to defend herself against the naval force lying inside the port. This opinion that one vessel is inadequate for a blockade means, of course, *any one* vessel, and means not only the *St. Paul* and the *Yosemite*, but of any single vessel which might be sent to perform blockade duty, which necessarily includes the *New Orleans*. Capt. Folger's letter must also, as it seems to us, be considered as *affirming the opinion of Captain Sigsbee*, of whose communication to the Navy Department, he must have been aware. And if his opinion, at the time he authorized Commander Davis to make the statement, and which he admits that he did make, was that the blockade was effective for commercial purposes though not for his defense in case of an attack, *he could easily*

have made that distinction at that time. Moreover, it is apparent to us, from the situation, that Captain Folger really intended to convey in this message the opinion that the blockade was ineffective as an entirety, *i. e.*, commercially, as well as from a military standpoint, because he could not have any reasonable fear of an attack that would necessarily involve the risk of his vessel, inasmuch as her speed as a cruiser would have enabled her to have easily retreated and saved herself from injury or destruction, in case a superior naval force were to issue from San Juan, for it is not shown that any of the Spanish vessels inside the port of San Juan were of equal speed to the *New Orleans*, though their combined armament might be greater. We, therefore, say that Captain Folger must have had in his mind, when he authorized Commander Davis to represent that in his opinion the blockade was ineffective, that *it was ineffective commercially as well as from a naval point of view.* The pretence, therefore, of Captain Folger at this late day, that he intended to say merely that the blockade was effective for commercial purposes, though not for his defense in case of an attack, looks to us as in excusably disingenuous.

But the pretence of Captain Folger is untenable and unsound as a matter of common sense. What is a blockade? The many definitions resolve themselves into one answer, namely, an *effective closing* of a port or a portion of a seacoast. This closing must, it seems to us, be an entirety, and necessarily includes every fact and circumstance connected with it; and it also seems to us to especially include all the means, military or otherwise, of resisting such effective closing, or preventing its continuance. If the fact of blockade is susceptible of division so as to leave it to be justly said that it may be effective for commercial purposes though not for the necessary military and naval operations, it is also, for the same reason, susceptible of further subdivision so as to admit the pretence that a

blockade might be effective so far as *small and slow vessels* are concerned, whilst not effective for *large and swift vessels;* for sail vessels, though not for steam-vessels; for open boats operated by hand power, though not for decked vessels operated by sails, etc. This would be an absurdity on its face; but, it seems to us, it is no less absurd than the pretence that there may be at the same time a blockade for commercial intercourse, whilst there is no blockade so far as the military and naval investment of the place is concerned.

Not only is the pretence that a commercial blockade may exist, although at the same time there may be no effective blockade for military and naval purpose, absurd on its face, but the authorities are against it.

In the case of Vrouw Judith, 1 C. Rob., 150, Sir William Scott says:

> "A blockade is a sort of circumvallation round a place, by which *all* foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off."

Again, in Juffrow Maria Schroeder, 3 C. Rob., 154, the same celebrated jurist declared:—

> "A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy and preventing the egress of their fleet, as at Cadiz, or on a more extended scale to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade, for the other is, in truth, no blockade at all, as far as neutrals are concerned."

And in Snow on International Law, so much relied upon by the counsel for the Government in this case, we find the following passage:

> "Blockades to be obligatory are to be effective—that is to say, maintained by a sufficient force to shut out the access of the *enemy's ships and other vessels* in reality."

It would, therefore, seem from these authorities that, in considering the question of the effectiveness of a blockade, the Court cannot fail to take account of the military or naval force with which the place is defended.

Furthermore, it is a rule that if the force claiming to maintain a blockade is driven away by the enemy's ships, the blockade is broken; or, as stated by Mr. Hall, "the blockade ceases if an enemy's force succeeds, for however short a time, in driving off the squadron which is charged with maintaining it" (citing The *Frederick Molke*, 1 Rob., 87; The *Columbia*, 1 Rob., 156; The *Hoffnung*, VI Rob., 115; *Vos and Graves v.* The Un. Ins. Co., II Johnson (American), 187; *Radcliff v.* Un. Ins. Co., VII Johnson, 53).

(Hall International Law, 4th Edition, p. 727.)

This rule is also stated in the second paragraph of "Instructions to Blockading Vessels and Cruisers," issued by the Navy Department on the 20th of June, 1898, under the head of General Order No. 492, where it is said:

> "If the blockading vessels be driven away by stress of weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade, such as chasing a blockade runner, *or are driven away by the enemy's force*, the blockade is abandoned or broken."

If, as thus laid down, a blockade is broken by the enemy's ships driving away the blockading squadron, then it seems to us to be a necessary consequence of this rule, that the admitted presence of the enemy in such force as to *effect the breaking of the blockade*, necessarily implies that in these conditions the blockade is, of necessity, *not to be considered as effective*.

Seventh.

The case as to the fact of the attempted entry of the *Olinde Rodrigues* into the Port of San Juan, at the time of her capture being, as already shown, not decided by the District Judge, and resting as on evidence only partly taken, the case should be recommitted to the District Court for further testimony, in the event that this Court shall hold that the District Court was in error as to the effectiveness of the blockade.

We have already called the attention of the Court to the fact that the testimony of a number of witnesses on board the *Olinde Rodrigues*, at the time of her capture, was not taken by the Prize Commissioners.

The case comes before this Court, also, upon the single finding of the District Judge as to the effectiveness of the blockade, there being no finding whatever as to the fact of an attempted breach of it.

We have also pointed out that the case was disposed of by the District Judge upon a mere motion based upon the insufficiency of the Government's proofs, and that this motion was made at a time when there was an outstanding order, allowing the claimant to introduce counter-proofs.

We shall, therefore, close this brief without noticing the case of the Government on the question as to whether the *Olinde Rodrigues* was or was not attempting to enter the port of San Juan at the time of her capture.

We will, however, hand up with this brief the comments upon this branch of the case made by Mr. Govin, one of counsel for the claimant, and submitted to the District Court, the only changes being in the references to the printed record, instead of the stenographer's notes.

Considering this branch of the case generally it may be remarked that all the testimony, as to the course or heading of the *Olinde Rodrigues* on the morning of her capture, comes entirely from persons not connected with her navigation, and almost exclusively from persons not on board of her, and taking their observations at a great distance, and, so far as those on the *New Orleans* are concerned, without any definite knowledge as to the position of their vessel.

All this evidence is necessarily unsatisfactory and defective in its character upon the point in question.

Without going into minute calculations, it may be remarked that if the Court will take a chart it will be seen that the difference between a heading for the port of San Juan by the *Olinde Rodrigues* and a heading for St. Thomas, on the course which her officers testify she was heading, is only a few points of the compass.

This fact, taken in connection with the evidence which shows that the situation of the *New Orleans* could not be exactly, or anything like exactly, located, renders any evidence from her navigators, especially in view of the fact that they were at a great distance off, extremely uncertain, unsatisfactory and inconclusive in its very nature.

The rule in admiralty is firmly established that the testimony of the captain, officers and men navigating a vessel as to her position and course, is entitled to greater weight than that of witnesses on other vessels, or wherever elsewhere situated, who judge or form their opinions by observation at a distance.

The *Havana*, 54 Fed. R., 411.
The *Hope*, 4 Fed. R., 89.
The *Erastus Wiman*, 20 Fed. R., 248, 249.
The *Alberta*, 23 Fed. R., 807.
The *Alexander Folsom*, 52 Fed. R., 411; S C., 3, C. C. A., 165.

Keeping this rule in view, we think that if this Court should decide to examine that branch of the case it will find the evidence too inconclusive to form the basis of a decision.

Eighth.

The destruction of the useless bill of health for San Juan, which in fact formed no part of the ship's papers, was a circumstance of no substantial importance in this case.

A great deal was said in the District Court, and much comment is made in this Court, upon the fact that the captain of the *Olinde Rodrigues* had a bill of health for San Juan, which upon his arrival at Charleston was destroyed.

The facts concerning this bill of health are such as to make this of no consequence whatever. It appears that papers of this kind are regularly furnished by the agents of the line in the different ports of the usual itinerary of the ships of the line, and that at one of these ports the agent had procured and placed on board the vessel a health clearance for San Juan, supposing, as they did, that the vessel would follow her regular itinerary. It appears furthermore, however, that as the captain, having been warned of the blockade of San Juan, had decided not to return there, another bill of health for St. Thomas was procured and the useless bill of health for San Juan was inadvertently allowed to remain in the office of the purser of the vessel, and when she arrived at Charleston, this fact having been discovered, the same was destroyed.

The captain in his examination *in preparatorio*, in answer to the interrogatories as to the ship's papers, did not mention the destruction of the San Juan bill of health. In the purser's examination, that officer, remembering the circumstance at the time, the fact was mentioned. The Captain immediately thereupon wrote a letter to the Prize Commissioners, asking for leave to appear before them and explain the circumstances under which he had this bill of health, and the reason for its destruction. His explanation appears at folios 87 and 88 of the Record, and his letter is printed in a supplement to the Record.

The District Judge, whilst commenting upon the destruction of this document as one of much impropriety, nevertheless concluded, as has often been concluded in other cases, that there was no intentional suppression, and, therefore, excused it as merely an error of judgment.

The rule, as laid down by this Court in the case of the *Pizarro*, 2 Wheat., 227, is that where concealment or spoliation of papers is open to explanation, and if the party fairly, frankly and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled. Under this rule Captain Pherivong should be excused for the inadvertent destruction of this useless bill of health.

The destruction of papers, under circumstances of greater suspicion, was excused in the case of the *Peterhoff*, 5 Wall, 28, 61, so far as the innocent shipowner was concerned.

See also, The *Peacock*, 4 Rob., 185.

Lastly.

It is respectfully submitted that the order of the District Court discharging the vessel on the ground that the blockade was ineffective should be affirmed; or, in the event that this Court shall reverse the said order, the cause should be remitted to the District Court for further proceedings and for its finding and determination upon a full presentation of the evidence.

EUSTIS, JONES & GOVIN,
Proctors for Claimant.

EDWARD K. JONES,
Of Counsel.

Supreme Court
FILED
APR 10 1899
JAMES H. McKENNEY
Clerk

No. 704.

Appx. to Brf. of Jones for Appellee

In the Supreme Court of the United States,

October Term, 1898.

Filed April 10, 1899.

THE UNITED STATES,
Appellant,

AGAINST

THE STEAMSHIP "OLINDE RODRIGUES," LA COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant-Appellee.

No. 704.
Prize.

Comments in the District Court by Mr. Govin, one of Counsel for the Claimant, upon the Government's Testimony.

United States District Court,

DISTRICT OF SOUTH CAROLINA.

THE UNITED STATES OF AMERICA,
Libellant,

against

THE STEAMSHIP *Olinde Rodrigues*, Compagnie Generale Transatlantique,
Claimant.

Prize.

Supplemental Brief on the Testimony.

The evidence in this case can be divided into two parts, (1) that which comes from the ship and the examinations *in preparatorio;* and (2) that which was taken under an order for further proof granted upon the petition of the Government and the captors.

I.

There is not a scintilla of evidence coming from the ship or in the examinations *in preparatorio* to justify the claim that the *Olinde Rodrigues* attempted to run the blockade at the Port of San Juan.

The learned Judge, in an opinion filed August 13th, 1898, so finds, and the closest examination of

the character of the ship, the class of trade in which she has been engaged, and was engaged, at the time of capture; her ownership and the character of her owners; the character of her captain and officers and the nature of her cargo; the papers found on board of her and the testimony *in preparatorio* all show absolutely that she was a merchantman belonging to a well-known and regular line of steamers, La Compagnie Generale Transatlantique, and at the time of capture proceeding from Port-au-Prince to St. Thomas and Havre. And, more over, there is uncontradicted evidence that her owners directed the captain of the ship not to enter the Port of San Juan, and not a particle of evidence has been offered to show that the Captain had sufficient motive to violate these instructions and take upon himself the responsibility of taking the owner's vessel, contrary to orders, into a blockaded port, risking capture and condemnation.

II.

The testimony presented in behalf of the Government and captors must be strong enough not only to upset the presumption in favor of the innocence of the vessel established by her character, papers and examinations *in preparatorio*, but must amount to proof clearly establishing the attempt to run the blockade.

Examining the testimony of the witnesses in behalf of the Government and the captors taken at Charleston, S. C., on September 15th, 1898, under the order for further proof, we find that Captain William N. Folger, Lieut. R. L. Russell, John R. Y.

Blakley and R. G. Nelson were examined. The testimony of these witnesses is almost identical as to the point that the *Olinde Rodrigues* was making for the Port of San Juan when sighted, but as to the distance and position of the two ships from the land and from each other they all differ materially. In answer to questions tending to test the accuracy of this statement, and to questions inquiring their reasons for making this statement that the *Olinde Rodrigues* was making for San Juan, they all unanimously answer that this statement is based on the fact that the masts of the *Olinde Rodrigues*, as seen from the deck of the *New Orleans*, were open, thus indicating that the *Olinde Rodrigues* was sailing south, or towards San Juan. This is the whole case against the *Olinde Rodrigues*, as made out by the officers of the *New Orleans*, testifying at Charleston.

These witnesses, upon cross-examination, all testified that they were ignorant of the exact position of the *New Orleans*, and admitted that the fact that the masts of the *Olinde Rodrigues* appeared open to those on board the *New Orleans* would not necessarily indicate that she was sailing to the south, or towards the port of San Juan, unless the *New Orleans* were on the same line, east and west, with the *Olinde Rodrigues*, and said that if the *New Orleans* was not on the same line, east and west, with the *Olinde Rodrigues*, but to the north of the *Olinde Rodrigues* the masts of the *Olinde Rodrigues* would appear open without necessarily indicating that she was sailing south, or towards the land or on a course other than the one stated in the log of the *Olinde Rodrigues*. It may be properly stated here that whether or not the officers admitted the truth of the proposition that the two vessels must have been on the same line when sighted to have the fact of the opening or closing of the masts have any bearing on the course of either of the vessels, cannot effect the obvious truth of the proposition.

Examining the testimony of each witness sepa-

rately, we find that there are glaring inaccuracies and assertions so lightly made as to affect the character of all of the testimony given by the officers of the *New Orleans* and to justify the inference that their efforts to capture blockade runners unconsciously affected their good sense and judgment. Assuming, of course, their good faith, this whole case is quite similar to the child alone at dusk in the graveyard attributing to the tombstones the characteristics of a ghost.

Choosing a few glaring examples, we find that Captain Folger, at page 11, (fol. 166 of printed Record), states that he did not know exactly the position of the *New Orleans*, but simply estimated it from his experience, and placed it about ten or twelve miles from the coast; disputes the accuracy of the log of the *New Orleans*, and believes that his statement is more correct than that of the navigator.

On page 15, (fol. 170 of printed Record), Captain Folger makes the *Olinde Rodrigues* run four miles in three minutes, when her speed is only twelve miles an hour, and admits that either he or the officer on deck must be mistaken as to her bearing when first seen.

On page 18, (fol. 174 of printed Record), of his testimony, Captain Folger admits that he cannot tell which way the *Olinde Rodrigues* was heading, but from her apparent course seemed nearer to the south than to the east.

On page 21, (fol. 177 of printed Record), of his testimony, Captain Folger admits that the *Olinde Rodrigues* came up from the land side towards his ship, admitting our contention that the *New Orleans* was further north from the coast than the *Olinde Rodrigues*.

On page 21, (fol. 181 of printed Record), of his testimony, Captain Folger admits that the *Olinde Rodrigues*, if on the course as claimed by the claimants, was on a proper one for the Culebra Passage.

Not one statement in all the testimony of Cap-

tain Folger proves that the *Olinde Rodrigues* was not on her proper course, and his testimony is simply an opinion of an officer whose duty it was to look for blockade runners, and he, as well as all of his crew, naturally believed every ship nearing San Juan to be a blockade runner.

The testimony of Lieut. Russell is so contradictory as to be valueless. Upon direct-examination he states that the *Olinde Rodrigues* and the *New Orleans*, when they came together, were west of a north and south line running through San Juan; and upon cross-examination admits he might have been mistaken in this respect, and they could have been east of the same line.

And, furthermore, throughout his cross-examination, when stating that he did not remember important matters which he should have remembered, as, for example, about taking observations, he fails to display the frankness that an officer in his position should have exhibited.

The testimony of Lieut. Blakley is unimportant, and has also the admissions of ignorance as to the position of the *New Orleans*.

The testimony of W. N. Nelson is unimportant, and has also the admissions of ignorance as to the position of the *New Orleans*.

At the examination had in New York, October 18th, 1898, under the order for further proof, the following witnesses were examined: William Hemsler Emory, George P. Eustis, John Burns, Robert H. Todd, Sergio Noa Lara and William R. A. Rooney.

The testimony of Captain W. H. Emory has no bearing on the case, and is not commented upon.

The testimony of George P. Eustis is also unimportant.

The testimony of John Burns is also of no importance.

The testimony of Robert H. Todd is of no consequence.

The testimony of Sergio Noa Lara is the testimony of a Porto Rican, who left Porto Rico with the ostensible intention of testifying in behalf of the claimants, and on arriving here testified in behalf of the captors, and his admissions that he made false statements in order to obtain the necessary permission to leave Porto Rico, renders the inference justifiable that he either had a great deal to gain by making such desperate efforts to leave the country to testify on behalf of the captors, or that he is utterly unreliable, regarding truth lightly and willing to make any statement likely to suit his purpose.

He was a telegraph operator conveying the information by telegraph that was given by the semaphore men at the station, and not much value can be attached to this information, for these men were accustomed to see the *Olinde Rodrigues* come to the port of San Juan regularly, and upon seeing her in the horizon naturally supposed she was to enter as was her custom.

This witness Lara goes further, however, and attempts to say that of his own knowledge and with his own eyes, he could see that the *Olinde Rodrigues* was making for the port of San Juan. This is simply an opinion of the witness founded upon nothing but a desire to serve the captors, with whose counsel he had had previous conversations, which fact he denied and only admitted after a most searching cross-examination.

His only reason for stating that the *Olinde Rodrigues* was heading for the port of San Juan is stated in answer to the question on page 81, (folio 299 of printed Record): "How can you state positively that the *Olinde Rodrigues* was headed for the port of San Juan when you do not know what course she would have to take for the Culebra Passage?" He answers: "It did not take much intelligence to know when a vessel is coming in the direction of the port and when she is going

to pass along, that is known by even the most unlearned people in Porto Rico."

On page 82, (folio 299 of printed Record), he further says, in answer to the question: "Then, as I understand, it is a very simple thing to tell the direction of a vessel at a distance at sea?" Answer. "It is a very easy thing to find out if a vessel is going into the port of Porto Rico and when she is going to continue her trip."

The only witness produced by the Government and the captors whose testimony, on account of his position as navigator of the *New Orleans*, is of importance, is that of Lieut. Rooney.

But even this witness's testimony does not bear directly on the point at issue, as he admits that he did not see the *Olinde Rodrigues* until after she was captured. Did not know her position or course and did not know what course the *New Orleans* steered when making for the *Olinde Rodrigues*, and simply is positive as to the approximate position of the *New Orleans* early in the morning before sighting the *Olinde Rodrigues*, and is positive as to the position of the *New Orleans* after the capture of the *Olinde Rodrigues*.

As to her position in the early morning a short while before the capture of the *Olinde Rodrigues*, he differs from every witness produced by the Government from on board the *New Orleans*, and instead of endeavoring to place her close inshore, as other witnesses have done, so that the *New Orleans* would be upon the same line west and east with the *Olinde Rodrigues* at the time that the *Olinde Rodrigues* was sighted and her masts seen open, he fixes the position of the *New Orleans* at least fifteen miles from the coast (see log of *New Orleans*). This is probably approximate to the truth, as from the testimony of the officers of the *New Orleans*, with a full speed of 22 knots an hour, she steamed for from 25 to 40 minutes in a course towards the south, in which time she must have run between nine and thirteen miles

towards the south, which would certainly make her distance from the coast, at the time she began her chase, more than fifteen miles, as when she made the capture she was about 7¼ miles from Morro, Morro bearing almost south, and probably 7 miles from the coast in a direct line south.

Lieut. Rooney in his testimony also made careful explanations as to the different courses supposed to have been taken by the *Olinde Rodrigues*, and of the proper course for a vessel sailing from Port-au-Prince to St. Thomas. This testimony is carefully noted in charts which are in evidence; and Lieut. Rooney testifies as follows in regard to these charts:

As to the courses which counsel for the Government and the captors questioned him about, he admits at pages 113, 144, 147–8, (folios 324, 347, 348, 350–352 of printed Record), that several courses might be properly steered by a vessel going from Port-au-Prince to St. Thomas, and that one of the proper courses would be to pass about twelve miles north of the harbor of San Juan.

The fact that a certain course if continued would lead a vessel ashore does not signify that the vessel intended to run ashore, but might be followed for the purpose of obtaining a bearing, etc. It may be properly mentioned here that vessels do not sail on straight lines and follow fixed courses between two given points as a train of cars, but considerations of wind, weather, shoals, tide, etc., especially in navigating along the coast, necessitate the vessels deviating from a straight line. For the purpose of positively ascertaining their position, vessels usually run in towards the land, when practicable to find certain lights or well-known points along the shore.

On behalf of the claimants the course, as marked in the log of the *New Orleans*, was read to Lieut. Rooney, and after carefully marking it on the chart, he admitted that it was a proper course for the *Olinde Rodrigues* to take to reach Culebra

Point with a view of going to St. Thomas, (pages 129–130, folios 337–338 of printed Record).

Lieut. Rooney further testifies that a vessel bound for San Juan, on an ordinary commercial voyage, would have taken a different route, and would not have been found where the *Olinde Rodrigues* was when captured, but would have been nearer shore.

He further admits that it is probable that if the *Olinde Rodrigues* intended to go to San Juan, and avoid the *New Orleans*, she would have hugged the shore, and not been away out at sea, (pages 147–8, folios 351–352 of printed Record).

Reviewing the testimony as a whole, we find that there is not the slightest proof to establish that the *New Orleans* and the *Olinde Rodrigues* were on the same line east and west. Upon that theory alone, that they were upon the same line at a distance of about ten to fifteen miles apart, could the fact that her masts appeared open to those on board the *New Orleans* indicate that she was heading toward the south, or toward the land? It appears from the testimony of the captors themselves that the *New Orleans* was about fifteen miles, if not more, north of the coast east of Morro. It is not disputed, nor has any evidence been offered to show, that the statements made in behalf of the claimants in the log as to the position and course of the *Olinde Rodrigues* are incorrect. The *Olinde Rodrigues*, sailing on admittedly a proper course, would be drawing to the south, and the *New Orleans* being to the north of her, the closer the vessels approached the more open would the masts of the *Olinde Rodrigues* appear. All the testimony confirms this theory, which is the true one, and the explanation of why the masts appeared open to those on board of the *New Orleans*.

A reading of the evidence shows an utter lack of such certain proof regarding the posi-

tion and course of the *Olinde Rodrigues* as to satisfy an impartial mind that it was the intention of the *Olinde Rodrigues* to enter the port of San Juan, and when in addition to this weakness there is found on behalf of the *Olinde Rodrigues* undisputed proof of her intention to pass by the port of San Juan without entering it, and that no motive can be shown or has even been suggested in evidence that might lead an impartial mind to the conclusion that the captain recklessly and without motive, and in the face of a U. S. cruiser, attempted to enter the port of San Juan, it would appear impossible to anyone to believe that such was his intention.

It is also apparent that to suppose the captain of the *Olinde Rodrigues*, if endeavoring to enter the port of San Juan in violation of the blockade, would chose a bright morning instead of sailing under cover of darkness, and that instead of hugging the shore and slipping into port, he would have been eight or ten miles at sea, is to assume, without any justification, that instead of being an able mariner and an intelligent man, he was a man without sense and a commander without judgment.

In addition to the above, the *Olinde Rodrigues* when captured, was east of the port of San Juan, conclusively proving that when the shot was fired from the *New Orleans* she was north of the port of San Juan, a position she would not have been in had she intended to enter the port of San Juan. The testimony is clear that from the time she was sighted until the shot was fired from the *New Orleans*, the *Olinde Rodrigues* did not materially change her course. The testimony is clear that she was between four and five miles from the *New Orleans* when the shot was fired. The testimony is clear that when the vessels stopped and came together, they were two or three miles east of the port of San Juan, and consequently the *Olinde Rodrigues* must

have been north of the port of San Juan at least five or six miles distant from the shore when the shot was fired; and being in that position, not even by a wild stretch of the imagination could it be supposed that she was making for the port of San Juan.

The motion to discharge the *Olinde Rodrigues*, it is respectfully submitted, should be granted.

EUSTIS, JONES & GOVIN,
Proctors for Claimant.

No. 704.

App't. to Brf. of Jones for Appellee

Office Supreme Court U. S.
FILED
APR 13 1899
JAMES H. MCKENNEY

Filed April 13, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 704. Prize.

THE UNITED STATES, APPELLANT,

against

THE STEAMSHIP OLINDE RODRIGUES, LA COMPAGNIE GENERALE TRANSATLANTIQUE, CLAIMANT—APPELLEE.

Remarks of Captain Poirot, of the French Navy, in Reference to the Attempted Blockade of San Juan, Porto Rico, by One War Vessel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-11-'99

THE FOLLOWING COMMUNICATION WAS RECENTLY ADDRESSED TO COUNSEL FOR THE APPELLEE BY CAPTAIN POIROT OF THE FRENCH NAVY IN REFERENCE TO THE ATTEMPTED BLOCKADE OF SAN JUAN, PORTO RICO, BY ONE WAR VESSEL.

NEW YORK, *le* 7 *Avril*, 1899.

CHER MONSIEUR JONES.

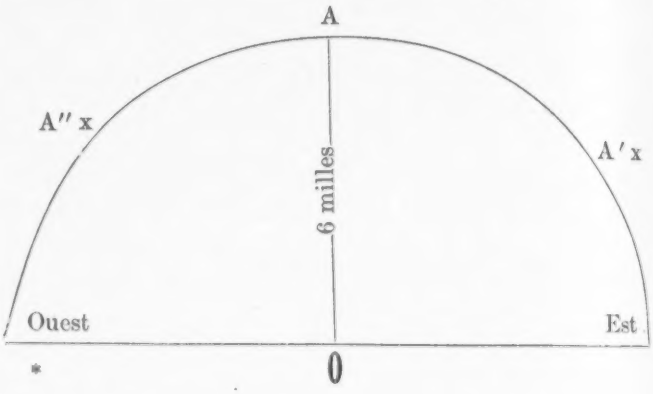
Vous m' avez demandé de vous faire connaitre mon opinion au sujet de la déclaration faite par les Commandants C. D. Sigsbée et C. H. Davis au sujet du blocus de San Juan. Je n'ai que le temps de répondre bien à la hâte à votre désir. Voici l'opinion que me permet d'énoncer mon expérience de trente années de service dans la Marine de Guerre Française, période pendant laquelle j'ai participé moimême à différents blocus dans la Mer du Nord en 1870 et dans les Mers de chine en 1884–'85.

Le Commandant Sigsbée écrit que: "In order to make "the blockade of San Juan positively effective, a consider- "able force of vessels is needed off that port, enough to de- "tach some occasionally to cruise about the island. West "of San Juan the coast, although bold, has outlying dangers, "making it easy at present for blockade-runners." * * *

Il est bien clair que, dans son esprit, il s'agit d'un blocus commercial à rendre effectif et qu'il n'a nullement en vue la possibilité d'une attaque par des forces supérieures puisqu'il s'occupe des "blockade-runners" et ajoute que si on lui envoie les navires qu'il réclame il ne craindra pas de les éparpiller en les envoyant croiser sur différents points de l'ile.

En effet un seul navire ne peut pas bloquer San Juan d'une maniére effective car San Juan est défendu par des forts qui obligent á se tenir au moins à 6 milles de l'entrée du port.

Or, que peut faire *un seul navire* dans ces conditions? Il n'a que deux lignes de conduite à suivre :



1°. Se placer devant l'entrée, *á 6 milles* en A et de l'a surveiller la passe ; mais dans ce cas, la nuit, tous les navires qui longeront la côte en venant aussi bien de l'Est que de l'ouest pourront entrer sans difficulte.

D'ailleurs cette hypothése est inadmissible, car un navire qui se trouve devant une côte ennemie, la nuit, ne peut ainsi rester immobile surtout lorsque, comme dans le cas présent, il sait pertinemment que le port bloqué posséde des moyens d'attaque.

2°. Se maintenir, en croisant sur un arc de cercle ayant pour centre l'entrée du port, et pour rayon la portée des canons des forts, soit 6 milles.

Dans cette seconde manïére de procéder qui me parait la seule possible, lorsque le navire bloqueur sera en un point quelconque de sa course en A′ par exemple il ne verra pas

* As there are three miles of shore batteries at the right of the Morro at San Juan, the base of this circle must be proportionately broadened, thus making the blockade still more difficult.

ce qui se passe dans l'ouest ; il en sera de même s'il est en A'', au point de vue des navires qui pourraient tenter d'entrer en suivant la cote Est.

Le Commandant C. H. Davis, a donc lui aussi parfaitement raison quand il dit :

" Captain Folger directed me to report that one ship was " inadequate for the blockade of San Juan, and there *should* " *be more than two ships off that port to establish an* EFFECTUAL " BLOCKADE."

Il est doncclair qu 'il ne se préoccupe, en demandant plus de deux navires, que de la question du blocus commercial, c'est à dire d'obtenir les moyens suffisants pour empêcher les " blockade runners," d'entrer dans le port. Car il est bien certain que des " blockade runners " n'essaieront jamais d'entrer *de jour* dans un port devant lequel se trouve un navire ennemi ; je ne puis pour ma part admettre qu'il existe un capitaine assez naïf, assez stupide pour tenter une semblable entreprise.

Une pareille tentative ne se fera jamais que la nuit et comme un " blockade runner " n'est monté que par des marins, des gens déterminés il entrera facilement dans un port qui n'est bloqué que par *un seul* navire, obligé de se tenir au moins à 6 milles de terre.

Donc, mon avis, comme celui du Captain Folger, est bien que " *there should be more than two ships* (*et il n'y en avait qu'un*) off that port *to establish an effectual blockade.*"

Quant à la question militaire, elle ne peut en aucune manière être confondue avec l'autre ; car le blocus commercial aurait pu être parfaitement complet si le nombre de navires employés avail été suffisant, et par suite, au point de vue des neutres, le blocus aurait été effectif.

Il aurait pu se faire pourtant que le chef de la force navale bloquant ne se soit pas cru en mesure de soutenir avec succès une attaque de l'ennemi essayant de faire lever le blocus ; il aurait dans ce cas demandé des renforts, en prevision d'un combat possible ; mais le blocus n'en aurait pas

moins été effectif et il ne se serait pas servi, dans sa demande de renforts, des expressions déjà citeés :

" There should be more than two ships off that port to establish an effectual blockade " (Captain C. H. Davis).

Ou encore : " In order *to make the blockade* of San Juan *positively effective a considerable force of vessels is needed* off that port * * * making *it easy* AT PRESENT for *blockade-runners.*"

Il ne s'agit toujurs là que de rendre un blocus effectif au point de vue des navires de commerce, des blockade runners.

C en'est pas ainsi que s'exprime un chef militaire qui demande des renforts en prévision d'une attaque possible; dans ce cas, et dans la circonstance présente, il dètaillerait les forces contre lesquelles il suppose avoir á lutter et il specifierait les renforts qu'il estime devoir lui être nécessaires, et qu'il réclame.

En s'exprimant comme ils l'ont fait les commandants Sigsbeé et Folger ne s'occupaient que áu blocus commercial et affirmaient qu'il n'etait pas effectif.

Veuillez agreer, Cher Monsieur Jones l'expression de mes sentiments les plus dévoués.

POIROT,

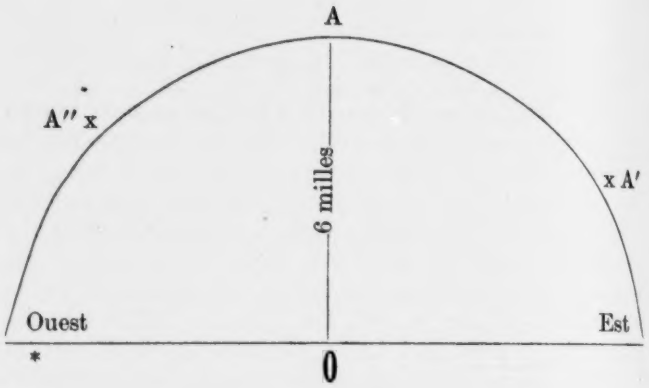
Capitaine de Frégate, Officier de la Légion d'Honneur.

TRANSLATION.

NEW YORK, *April* 7, 1899.

DEAR MR. JONES: You have asked me to make known to you my opinion with regard to the statements made by Commanders C. D. Sigsbee and C. H. Davis, with regard to the blockade of San Juan. I have only the time to reply very hastily to your desire. Here is the opinion that my experience of thirty years in the French navy permits me to give, during which period I have participated myself in different blockades in the North Sea in 1870 and in the China Sea in 1884 and 1885. Commander Sigsbee writes, "that in order to make the blockade of San Juan effective a considerable force of vessels is needed off that port, enough to detach some occasionally to cruise about the island. West of San Juan the coast, although bold, has outlying dangers, making it easy at present for blockade runners," etc., etc.

It is very clear that to his mind it was a question of a commercial blockade to be rendered effective, and that he had in nowise any view of the possibility of an attack by superior forces, as he only mentions blockade-runners, and adds that if the ships he asks for are sent him he will have no fear in scattering them, sending them to cruise at different points of the island. As a matter of fact, one ship alone cannot blockade San Juan in an effective manner, for San Juan is defended by forts which compel a ship to keep at least six miles from the entrance to the fort. Now, what can one ship alone do in these conditions? She has only two ways of acting:



First. To place herself opposite the entrance six miles off at A, and from there watch the entrance; but in this case at night every ship which would shave along the shore, whether coming from the east or from the west, could enter without any difficulty. For that matter this hypothesis is inadmissible, for a ship which is off a hostile shore at night cannot remain stationary in this way, especially when, as in the present case, he knows certainly that the port blockaded possesses means of attack.

Second. To keep cruising upon an arc of a circle having as its center the entrance to the port and as its circumference the range of cannons of the forts—that is to say, six miles. In this second way of proceeding, which appears to me the only one possible, when the blockading ship will be at any point of its course, at A′, for example, she will not see what is taking place in the west. It will be the same with regard

* As there are three miles of shore batteries at the right of the Morro at San Juan, the base of this circle must be proportionately broadened, hus making the blockade still more difficult.

to A" as regards ships which might try to enter by following the eastern shore.

Commander C. H. Davis is also perfectly right when he says:

"Captain Folger directed me to report that one ship was inadequate for the blockade of San Juan, and that there *should be more than two ships off that port to establish an effectual blockade.*"

It is therefore clear that in asking for more than two ships he only treats of the question of commercial blockade—that is to say, to obtain sufficient means to prevent blockade-runners from entering the port, for it is very certain that blockade-runners would never try to enter by day into a port before which an enemy's ship is stationed. For my part I cannot admit that there exists a captain so green, so stupid, as to attempt such an enterprise. Such an attempt will never be made except at night, and as a blockade, runner is only manned by seamen, determined men, she can easily enter a port which is only blockaded by one vessel alone which is obliged to keep herself at least six miles from the shore. Therefore my opinion, like that of Captain Folger, is certainly that "*there should be more than two ships (there was only one) off that port to establish an effectual blockade.*"

As to the military question, it should in nowise be confounded with the other, for the commercial blockade might have been perfectly complete if the number of ships employed had been sufficient, and therefore, as regards neutrals, the blockade would have been effective.

It might have been, nevertheless, that the chief of the naval force blockading found himself incapable of sustaining with success the attack of an enemy trying to break the blockade. In that case he would have called for reinforcements, foreseeing a possible combat; but the blockade would not have been any less effective, and he would not have

used in his request for reinforcements, the expressions already quoted, "There should be more than two ships off that port to establish an effectual blockade" (Capt. C. H. Davis); or again, "In order *to make the blockade* of San Juan *positively effective, a considerable force of vessels is needed* off that port, * * * making *it easy at present* for blockade *runners.*"

Certainly these expressions concern only the rendering of a blockade effective as regards merchant vessels, blockade-runners.

A military chief who calls for reinforcements, foreseeing a possible attack, does not express himself in this way. In this case and under the present circumstances he would detail the forces against which he supposes that he will have to struggle, and would specify the reinforcements which he thinks ought to be necessary for him and which he calls for.

In expressing themselves as they have done, Commanders Sigsbee and Folger contemplated only a commercial blockade and were declaring that it was not effective.

Please receive, dear Mr. Jones, the expression of my most devoted sentiments.

POIROT,
Commander of the French Navy,
(Capitaine de Frégate),
Officer of the Legion of Honor.